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8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 KELLEY J. S.,

11 Plaintiff,

12 v.

13 COMMISSIONER OF SOCIAL
14 SECURITY,

15 Defendant.

CASE NO. 3:18-CV-05782-DWC

ORDER REVERSING AND
REMANDING DEFENDANT'S
DECISION TO DENY BENEFITS

16 Plaintiff filed this action, pursuant to 42 U.S.C. § 405(g), for judicial review of
17 Defendant's denial of her application for disability insurance benefits ("DIB"). Pursuant to 28
18 U.S.C. § 636(c), Federal Rule of Civil Procedure 73 and Local Rule MJR 13, the parties have
19 consented to have this matter heard by the undersigned Magistrate Judge. *See* Dkt. 2.

20 After considering the record, the Court concludes the Administrative Law Judge ("ALJ")
21 erred when she failed to provide clear and convincing reasons supported by substantial evidence
22 for discounting Plaintiff's subjective symptom testimony. Had the ALJ properly considered
23 Plaintiff's subjective complaints, Plaintiff's residual functional capacity ("RFC") may have
24 included additional limitations. The ALJ's error is, therefore, not harmless, and this matter is

ORDER REVERSING AND REMANDING
DEFENDANT'S DECISION TO DENY BENEFITS

1 reversed and remanded pursuant to sentence four of 42 U.S.C. § 405(g) to the Commissioner of
2 Social Security (“Commissioner”) for further proceedings consistent with this Order.

3 FACTUAL AND PROCEDURAL HISTORY

4 On March 30, 2015, Plaintiff filed an application for DIB, alleging disability as of the
5 date of her application. *See* Dkt. 8, Administrative Record (“AR”) 15. The application was
6 denied upon initial administrative review and on reconsideration. *See* AR 15. A hearing was held
7 before ALJ Marilyn S. Mauer on February 27, 2017. *See* AR 30-43. A second, supplemental,
8 hearing was held before the ALJ on July 10, 2017. AR 44-68. In a decision dated November 3,
9 2017, the ALJ determined Plaintiff was not disabled. *See* AR 15-24. Plaintiff’s request for
10 review of the ALJ’s decision was denied by the Appeals Council, making the ALJ’s decision the
11 final decision of the Commissioner. *See* AR 1-5; 20 C.F.R. § 404.981, § 416.1481.

12 In the Opening Brief, Plaintiff maintains the ALJ erred by failing to properly: (1)
13 consider Plaintiff’s subjective symptom testimony; (2) consider lay witness testimony; and (3)
14 assess Plaintiff’s RFC and her ability to perform her past relevant work. Dkt. 12, p. 1. Plaintiff
15 requests remand for an award of benefits. *Id.* at pp. 16-17.

16 STANDARD OF REVIEW

17 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner’s denial of
18 social security benefits if the ALJ’s findings are based on legal error or not supported by
19 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th
20 Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

DISCUSSION

I. Whether the ALJ provided specific, clear, and convincing reasons for finding Plaintiff's subjective symptom testimony not fully supported.

Plaintiff contends the ALJ erred by failing to provide specific, clear, and convincing reasons for finding Plaintiff's subjective symptom testimony not fully supported. Dkt. 8. To reject a claimant's subjective complaints, the ALJ must provide "specific, cogent reasons for the disbelief." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996) (citation omitted). The ALJ "must identify what testimony is not credible and what evidence undermines the claimant's complaints." *Id.*; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993). Unless affirmative evidence shows the claimant is malingering, the ALJ's reasons for rejecting the claimant's testimony must be "clear and convincing." *Lester*, 81 F.2d at 834. Questions of credibility are solely within the control of the ALJ. *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982). The Court should not "second-guess" this credibility determination. *Allen v. Heckler*, 749 F.2d 577, 580 (9th Cir. 1984). In addition, the Court may not reverse a credibility determination where that determination is based on contradictory or ambiguous evidence. *Id.* at 579.¹

Plaintiff testified she cannot work due to fibromyalgia, severe osteoarthritis, a herniated disk in her back, and sciatica. AR 47-48. She also has emotional breakdowns, severe anxiety, and depression. AR 48. Plaintiff states she can lift and carry ten pounds no higher than her chest. AR 48. She can sit for about 30 minutes in a chair during the average day before she needs to get up and move because she feels restless and achy. AR 49. Plaintiff can stand continuously for

¹ On March 28, 2016, the Social Security Administration changed the way it analyzes a claimant's subjective symptom testimony. *See* SSR 16-3p, 2016 WL 1119029 (Mar. 16, 2016); 2016 WL 1237954 (Mar. 24, 2016). The term "credibility" is no longer used. 2016 WL 1119029, at *1. Further, symptom evaluation is no longer an examination of a claimant's character. *See id.* at *10 ("adjudicators will not assess an individual's overall character or truthfulness"). However, the applicable Ninth Circuit case law still refers to the term "credibility." *See Trevizo v. Berryhill*, 871 F.3d 664, 678 n.5 (9th Cir. 2017) (noting SSR 16-3p is consistent with existing Ninth Circuit precedent). Thus, at this time, the Court will use "credibility" and "subjective symptom testimony" interchangeably.

1 approximately 10 to 15 minutes before her legs and lower back start aching and she needs to
2 move. AR 49. Plaintiff testified she can walk for approximately 15 minutes without interruption
3 and does so about three times a week. AR 50-51. She climbs four stairs daily. AR 52. Plaintiff
4 takes a nap for one to three hours every day, and Plaintiff has to stay in bed one to two days per
5 month due to feeling sick and aching from head to toe. AR 51, 62.

6 On a typical day, Plaintiff watches television, takes a shower, takes a nap, works on a
7 jigsaw puzzle, and fixes breakfast and dinner. AR 57. Plaintiff is able to bathe and dress herself
8 and drives two to three times per week. AR 50. At home, she is responsible for laundry, cooking,
9 grocery shopping, some gardening, and keeping the house clean. AR 52. In her Adult Function
10 Report, Plaintiff stated that she cooks sandwiches, soup, and cereal. AR 245. She no longer
11 prepares big meals and eats more frozen meals. AR 245. Plaintiff usually shops on the weekend
12 with her son and has assistance with heavier items. AR 57.

13 Plaintiff testified that she takes oxycodone, Paxil,² and a blood pressure medication. AR
14 55. The medications are effective, but cause nausea, sleepiness, and a loss of energy. AR 55-56.

15 The ALJ found Plaintiff's "medically determinable impairments could reasonably be
16 expected to cause the alleged symptoms; however, the claimant's statements concerning the
17 intensity, persistence and limiting effects of these symptoms are not entirely consistent with the
18 medical evidence and other evidence in the record[.]" AR 21. The ALJ determined Plaintiff's
19 complaints were not fully supported because (1) Plaintiff's pain was controlled with medication;
20 (2) the record does not support Plaintiff's contention that she was bedridden two days per month;
21 (3) Plaintiff was not following the advice of medical professionals; (4) Plaintiff's complaints were
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24 ² Paxil is a medication that can be used to treat depression and anxiety disorders.

1 inconsistent with her treatment history; and (5) the objective medical evidence did not support her
2 shoulder and lower back complaints. AR 21-22.

3 First, the ALJ discounted Plaintiff's testimony because Plaintiff's fibromyalgia pain was
4 controlled by medication. AR 21. The ALJ concluded that, because there was no indication that
5 Plaintiff ran out of pain medication and Plaintiff was attempting to taper her pain medication, her
6 degree of pain did not preclude her from the performing work within the RFC. AR 21. "An ALJ
7 may properly rely on the fact that medication is helpful to discount a claimant's credibility."
8 *Wilson v. Colvin*, 2013 WL 4040122, at *7 (C.D. Cal. Aug. 8, 2013). The records show Plaintiff
9 was stable on a non-escalating dose of oxycodone for her fibromyalgia and osteoarthritis pain.
10 See AR 55, 372-73, 523. The medical records indicate the pain medication did not, however,
11 improve Plaintiff's physical or work functioning. See AR 373 (physical functioning same), 524
12 (work functioning not improved); 529 (physical functioning worsened), 534 (physical
13 functioning same). Further, Plaintiff reported her average level of pain while taking the pain
14 medications was a five and her worst pain was a ten on a scale of one to ten. AR 524, 615, 619-
15 20.

16 The ALJ states Plaintiff was attempting to taper her medication, indicating her pain was
17 generally managed with medication. AR 21. The record cited to by the ALJ shows Plaintiff was
18 open to minimizing her narcotic use, but Plaintiff's medical providers did not decrease Plaintiff's
19 dosage and Plaintiff reported she was still experiencing pain when taking the medication. AR 21,
20 610, 615, 620. While Plaintiff reported her pain was better when she was taking oxycodone, the
21 record does not reflect that Plaintiff's pain resolved with pain medication nor that Plaintiff's
22 ability to function improved with pain medication use. The ALJ fails to explain how evidence
23 showing Plaintiff's pain was more controlled, but not eliminated, with pain medication use
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1 discounts Plaintiff's reports of disabling pain. Therefore, the ALJ's first reason for discounting
2 Plaintiff's subjective symptom testimony is not clear and convincing. *See Krauze v. Astrue*, 2012
3 WL 2357250, at * 9-10 (D. Ariz. June 20, 2012) (finding the ALJ's decision to discount the
4 plaintiff's testimony because the plaintiff's pain medication reduced his pain and did not cause
5 side effects was not supported by the record when the evidence showed the plaintiff's pain
6 medication did not completely control the plaintiff's pain); *Holohan v. Massanari*, 246 F.3d
7 1195, 1205 (9th Cir. 2001) ("That a person ... makes some improvement does not mean that the
8 person's impairments no longer seriously affect her ability to function in a workplace.").

9 Second, the ALJ discounted Plaintiff's testimony because "the record does not reflect"
10 that Plaintiff was bedridden by fibromyalgia pain two days per month. AR 21. The ALJ failed to
11 cite to any records to support this finding. Without an adequate explanation regarding what
12 evidence "does not reflect" Plaintiff was bedridden two days per month, the ALJ has failed to
13 meet the level of specificity required. *See Treichler v. Comm'r of Soc. Sec. Admin.*, 775 F.3d
14 1090, 1103 (9th Cir. 2014) (citation omitted) ("the ALJ must provide some reasoning in order for
15 us to meaningfully determine whether the ALJ's conclusions were supported by substantial
16 evidence"); *Blakes v. Barnhart*, 331 F.3d 565, 569 (7th Cir. 2003) ("We require the ALJ to build
17 an accurate and logical bridge from the evidence to her conclusions so that we may afford the
18 claimant meaningful review of the SSA's ultimate findings."). Furthermore, Social Security
19 Administration rulings recognize "the symptoms of [fibromyalgia] can wax and wane so that a
20 person may have 'bad days and good days.'" SSR 12-2p, 2012 WL 3104869, at *6; *see also*
21 *Brosnahan v. Barnhart*, 336 F.3d 671, 672 n. 1 (8th Cir. 2003) (fibromyalgia causes "long-term
22 but variable levels of muscle and joint pain, stiffness, and fatigue"). Therefore, the ALJ's second
23 reason for discounting Plaintiff's fibromyalgia pain is insufficient.

1 Third, the ALJ discounted Plaintiff's testimony regarding Plaintiff's complaints of
2 fibromyalgia pain because Plaintiff was not following recommended treatment. AR 21. The
3 Ninth Circuit has "long held that, in assessing a claimant's credibility, the ALJ may properly rely
4 on unexplained or inadequately explained failure to seek treatment or to follow a prescribed
5 course of treatment." *Molina v. Astrue*, 674 F.3d 1104, 1113 (9th Cir. 2012) (internal quotations
6 and citations omitted).

7 Here, the ALJ found Plaintiff's failure to engage in general exercise, as recommended by
8 her providers, showed Plaintiff's impairments were not as severe as alleged. AR 21. The ALJ did
9 not cite to any medical records showing Plaintiff's providers prescribed an exercise treatment
10 plan. *See* AR 21. Moreover, the record shows Plaintiff does home exercises every other day and
11 walks around the block three times per week for fifteen minutes. AR 51. Based on the evidence,
12 Plaintiff is attempting to comply with any alleged recommendation to exercise. Further, Plaintiff
13 testified she does not exercise at a faster pace because it gets difficult for her. AR 51. The ALJ
14 did not consider Plaintiff's explanation for why she was not exercising more. *See* AR 21. As
15 such, the ALJ's third reason for discounting Plaintiff's testimony is not clear and convincing. *See*
16 *Trevizo v. Berryhill*, 871 F.3d 664, 680 (9th Cir. 2017) (finding the ALJ could not discount the
17 plaintiff's testimony due to noncompliance when the ALJ failed to consider the plaintiff's
18 explanation for her failure to follow prescribed treatment); *Leslee C. v. Berryhill*, 2019 WL
19 130298, at *4 (W.D. Wash. Jan. 8, 2019) (finding the ALJ erred by not considering all reasons
20 pertinent to absent treatment when discounting the plaintiff's testimony); Social Security Rule
21 ("SSR") 16-3p (stating the Administration "will not find an individual's symptoms inconsistent
22 with" evidence of prescribed treatment "without considering possible reasons he or she may not
23 comply with treatment[.]").
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1 Fourth, while not clearly stated, the Court finds the ALJ discounted Plaintiff's testimony
2 because of inconsistencies between Plaintiff's testimony and her treatment history. *See* AR 21-
3 22. Determining a claimant's complaints are "inconsistent with clinical observations" can satisfy
4 the clear and convincing requirement. *Regennitter*, 166 F.3d at 1297; *see also Fisher v. Astrue*,
5 429 F. App'x 649, 651 (9th Cir. 2011). Further, as stated above, the ALJ may properly rely on an
6 unexplained or inadequately explained failure to seek treatment. *Molina*, 674 F.3d at 1113.
7 However, "an ALJ does not provide specific, clear, and convincing reasons for rejecting a
8 claimant's testimony by simply reciting the medical evidence in support of his or her residual
9 functional capacity determination." *Brown-Hunter v. Colvin*, 806 F.3d 487, 489 (9th Cir. 2015).
10 Rather, to discount a claimant's testimony, an ALJ "must state *which* testimony is not credible
11 and what evidence suggests the complaints are not credible." *Dodrill*, 12 F.3d at 917 (emphasis
12 added); *see also Lester*, 81 F.3d at 834.

13 Here, the ALJ summarized portions of the medical records related to Plaintiff's shoulder,
14 back, knee, and hip pain, but the ALJ did not link the cited medical records to any specific
15 portion of Plaintiff's subjective symptom testimony. *See* AR 21-22. In only providing a recitation
16 of the medical evidence, the ALJ failed to identify *which* testimony is credible and *what*
17 evidence suggests Plaintiff's complaints are not credible. *See Dodrill*, 12 F.3d at 917.
18 Accordingly, the ALJ's finding that Plaintiff's subjective complaints regarding her shoulder, knee,
19 back, and hip pain were inconsistent with Plaintiff's treatment history is insufficient to discount her
20 testimony.

21 Finally, to the extent the ALJ discounted Plaintiff's subjective symptom testimony because
22 it was not supported by the objective medical evidence, this reason is insufficient. *See* AR 21-22.
23 A claimant's pain testimony may not be rejected "*solely* because the degree of pain alleged is not
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1 supported by objective medical evidence.” *Orteza v. Shalala*, 50 F.3d 748, 749-50 (9th Cir.
2 1995) (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir. 1991) (en banc)); *see also*
3 *Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir. 2001); *Fair v. Bowen*, 885 F.2d 597, 601 (9th
4 Cir. 1989). The same is true with respect to a claimant’s other subjective complaints. *See Byrnes*
5 *v. Shalala*, 60 F.3d 639, 641-42 (9th Cir. 1995).

6 The Court finds the ALJ provided five reasons for discounting Plaintiff’s subjective
7 symptom testimony. AR 21-22. As discussed above, the ALJ’s first four reasons for discounting
8 Plaintiff’s subjective symptom testimony are improper. The only remaining reason for
9 discounting Plaintiff’s complaints is because the complaints are unsupported by the objective
10 evidence. As this is the sole remaining reason and because a claimant’s pain testimony may not
11 be rejected solely on the basis that it is unsupported by the objective evidence, the Court need not
12 determine if this fifth reason is proper and finds the ALJ has not provided legally sufficient
13 reasons for discounting Plaintiff’s subjective symptom testimony.

14 For the above stated reasons, the Court finds the ALJ failed to provide a specific, clear,
15 and convincing reason for discounting Plaintiff’s subjective symptom testimony. Accordingly,
16 the ALJ erred.

17 “[H]armless error principles apply in the Social Security context.” *Molina v. Astrue*, 674
18 F.3d 1104, 1115 (9th Cir. 2012). An error is harmless, however, only if it is not prejudicial to the
19 claimant or “inconsequential” to the ALJ’s “ultimate nondisability determination.” *Stout v.*
20 *Commissioner, Social Security Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006); *see Molina*, 674
21 F.3d at 1115. The determination as to whether an error is harmless requires a “case-specific
22 application of judgment” by the reviewing court, based on an examination of the record made
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1 “‘without regard to errors’ that do not affect the parties’ ‘substantial rights.’” *Molina*, 674 F.3d at
2 1118-1119 (quoting *Shinseki v. Sanders*, 556 U.S. 396, 407 (2009)).

3 Plaintiff testified to greater limitations than the limitations included in the RFC
4 determination. For example, Plaintiff testified she can sit for about 30 minutes, stand
5 continuously for approximately 10 to 15 minutes, and walk for approximately 15 minutes
6 without interruption. AR 50-51. She also testified that she has to stay in bed one to two days per
7 month, which shows absenteeism. AR 62. In contrast, the RFC limited Plaintiff to sitting,
8 standing, and walking for six hours in an eight-hour day. AR 20. The ALJ also did not find
9 Plaintiff would be absent from work. *See* AR 20. Had the ALJ properly considered Plaintiff’s
10 subjective symptom testimony, she may have included additional limitations in the RFC and in
11 the hypothetical questions posed to the vocational expert. As the ultimate disability
12 determination may have changed, the ALJ’s error is not harmless and requires reversal.

13 **II. Whether the ALJ provided proper reasons for discounting lay witness**
14 **testimony.**

15 Plaintiff contends the ALJ failed to provide germane reasons for discounting the lay
16 witness opinion of Plaintiff’s ex-husband. Dkt. 12, pp. 12-13. The Court concludes the ALJ
17 committed harmful error in assessing Plaintiff’s subjective symptom testimony. *See* Section I,
18 *supra*. Because the ALJ’s reconsideration of Plaintiff’s subjective symptom testimony may
19 impact her assessment of lay witness opinions, on remand, the ALJ must reconsider the
20 statement submitted by Plaintiff’s ex-husband.

21 **III. Whether the ALJ erred at Step 4.**

22 Plaintiff also maintains the ALJ erred by finding Plaintiff can perform her past relevant
23 work because the RFC did not contain all Plaintiff’s limitations. Dkt. 12, pp. 13-16. Plaintiff also
24 argues the ALJ’s finding at Step 4 was not supported by substantial evidence because the ALJ

1 relied on an inaccurate Dictionary of Occupational Titles (“DOT”) number to describe Plaintiff’s
2 past relevant work. *Id.*

3 Regardless of whether the ALJ erred at Step 4, the ALJ committed harmful error when
4 she rejected Plaintiff’s subjective symptom testimony, which included additional functional
5 limitations. *See* Section I, *supra*. The ALJ’s error in assessing Plaintiff’s subjective symptom
6 testimony requires remand to the Commissioner for proper consideration of Plaintiff’s RFC and
7 to reconsider each of the remaining steps in the administrative process. As the ALJ’s re-
8 evaluation of Plaintiff’s testimony may impact all aspects of the ALJ’s decision, the ALJ is
9 instructed to re-evaluate this entire matter on remand, completing each step of the sequential
10 evaluation process. At Step 4, the ALJ shall re-evaluate whether the DOT number relied on by
11 the vocational expert accurately describes Plaintiff’s past relevant work.

12 **IV. Whether this case should be remanded for an award of benefits.**

13 Plaintiff argues this matter should be remanded with a direction to award benefits. *See*
14 Dkt. 12, pp. 16-17. The Court may remand a case “either for additional evidence and findings or
15 to award benefits.” *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996). Generally, when the
16 Court reverses an ALJ’s decision, “the proper course, except in rare circumstances, is to remand
17 to the agency for additional investigation or explanation.” *Benecke v. Barnhart*, 379 F.3d 587,
18 595 (9th Cir. 2004) (citations omitted). However, the Ninth Circuit created a “test for
19 determining when evidence should be credited and an immediate award of benefits directed[.]”
20 *Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000). Specifically, benefits should be awarded
21 where:

- 22 (1) the ALJ has failed to provide legally sufficient reasons for rejecting [the
23 claimant’s] evidence, (2) there are no outstanding issues that must be resolved
24 before a determination of disability can be made, and (3) it is clear from the

1 record that the ALJ would be required to find the claimant disabled were such
2 evidence credited.

3 *Smolen*, 80 F.3d 1273 at 1292; *McCartey v. Massanari*, 298 F.3d 1072, 1076-77 (9th Cir. 2002).

4 The Court has determined, on remand, the ALJ must re-evaluate Plaintiff's subjective
5 symptom testimony, the opinion of Plaintiff's ex-husband, and whether Plaintiff is capable of
6 performing jobs existing in significant numbers in the national economy. Therefore, there are
7 outstanding issues which must be resolved and remand for further administrative proceedings is
8 appropriate.

9 CONCLUSION

10 Based on the foregoing reasons, the Court hereby finds the ALJ improperly concluded
11 Plaintiff was not disabled. Accordingly, Defendant's decision to deny benefits is reversed and
12 this matter is remanded for further administrative proceedings in accordance with the findings
13 contained herein.

14 Dated this 12th day of July, 2019.

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16 David W. Christel
17 United States Magistrate Judge
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